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ONE LOVE MINISTRIES and
CALVARY CHAPEL CENTRAL OAHU

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI`I

THE STATE OF HAWAII, *ex rel.* MITCHELL KAHLE and HOLLY HUBER, Plaintiffs, v. ONE LOVE MINISTRIES; CALVARY CHAPEL CENTRAL OAHU; DOE ENTITIES 1-50; JOHN DOES 1-50; and JANE DOES 1-50, Defendants.	CIVIL NO. 13-1-0893-03 LWC (Other Civil Action) **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT BASED ON THE PUBLIC DISCLOSURE BAR; DECLARATION OF JAMES HOCHBERG; EXHIBIT A; CERTIFICATE OF SERVICE** Hearing Date: TBD Time: TBD Judge: Hon. Lisa W. Cataldo Trial Date: None presently scheduled

Plaintiffs One Love Ministries and Calvary Chapel Central Oahu ("Churches"), through undersigned counsel, file this Reply in Support of the Churches' Motion to Dismiss and/or Summary Judgment on the Hawaii False Claims Act ("HFCA") claims brought by Plaintiffs/Relators ("Plaintiffs") in the First Amended Complaint ("FAC").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

After seven years of litigation and discovery into the facts implicating the HFCA's public disclosure bar, the time has come for Plaintiffs' crusade against Defendant Churches to end. The record and the law confirm that Plaintiffs' case is predicated upon public disclosures, and that they are not original sources under either the pre- or post-amendment HFCA.

This is no surprise. Plaintiffs are not and never have been insiders bringing forth unknown information of fraud to an unwitting government. They are rather political activist outsiders who disliked what they deemed churches' "monopolistic" participation in Hawaii's Community Use Program, and decided to launch an "investigation" in the hopes that such use might be curtailed or eliminated by the Hawaii Department of Education. Kahle Dep. 22, 45-46. But Plaintiffs eventually grew frustrated with Hawaii state officials because they did not appear to share Plaintiffs' concerns. Kahle Dep. 52-53, 56. It was at that point their attorney told them they could advance their cause under the HFCA; they then repurposed their planned investigative report to the DOE into a fraud action against the Churches. Kahle Dep. 49, 119-20.

It is no wonder that Plaintiffs' project has been such an exceedingly poor fit from the start. Plaintiffs' political advocacy project was and remains a political one, and their concerns should be addressed to the political branches, not the courts. Faced with this incongruity, and the fact that the record and the law require dismissal, Plaintiffs opt for misdirection and obfuscation. They try to bury this Court in an avalanche of facts scattered about in various declarations, attachments, exhibits, and string citations, although the vast majority of them support the Churches' arguments or are irrelevant to the public disclosure bar. They argue that the ICA opinion requires the Churches to carry Plaintiffs' burden to prove jurisdiction, when axiomatic law holds the opposite. They intentionally invoke and apply the wrong "original source" standard to insulate their pre-July 9, 2012 claims from dismissal. And they push for delay by arguing that the Churches' Motion implicates facts going to the merits of Plaintiffs' claims, which is demonstrably false.

None of Plaintiffs' gambits change the fact that the public disclosure bar demands dismissal of their case. Plaintiffs posit their investigative efforts entitle them to millions of dollars, but their knowledge all derives from public disclosures, thereby barring their action. Accordingly, for the reasons already established in their opening Memorandum, and for those additional reasons discussed here in Reply, the Churches' Motion to Dismiss Plaintiffs' pre-amendment claims and Motion for Summary Judgment on Plaintiffs' post-amendment claims should be granted, and this case dismissed with prejudice.

LEGAL STANDARDS

At the outset, three issues raised by Plaintiffs merit clarification.

First, Plaintiffs apply throughout their Opposition only the *post*-amendment original source standard, even for their *pre*-amendment claims. *See, e.g.*, Opp. 3 (citing only to H.R.S. § 661-31, and not also HRS § 661-28 (2011)); 14 (arguing they are original sources for "both the pre-and post-amendment claimed violations" but using only the post-amendment standard). But the entire point of the ICA opinion was that Plaintiffs' pre-amendment claims have to be reviewed under the HFCA's pre-amendment public disclosure bar, which requires Plaintiffs to show that they have "direct and independent knowledge of the information on which the[ir] allegations are based." ICA Op. 16 (quoting H.R.S. § 661-28). Even so, Plaintiffs cannot meet the pre- or post-amendment standard.

Second, Plaintiffs improperly try to shift their burden to the Churches, arguing that the ICA required the Churches to prove "Relators' direct and independent knowledge of such [publicly disclosed] information (or lack thereof) underlying each claimed offending event." Opp. 6.[1] The ICA ordered nothing of the kind, nor would it, given that only Plaintiffs would possess that knowledge if it existed. *See U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348–49 (4th Cir. 2009) (relator has "burden of proving himself entitled to original source status"); *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1052–53 (10th Cir. 2004) (same). Even though the Churches *have* disproven Plaintiffs' claimed original source status, they did not have to under the HFCA.[2]

Third, Plaintiffs' cite repeatedly to their "independent investigation" and "copious independent efforts" as a substitute to proving they are original sources. Opp. 7, 10, 11-13, 16. But effort, no matter how ardent or time-consuming, is not *knowledge* under the HFCA. *See U.S. ex rel. Bly-Magee v. Premo*, 470 F.3d 914, 917 (9th Cir. 2006) ("lengthy explanation" about relator's "own investigation" was insufficient). Moreover, most of Plaintiffs' self-declared labors have absolutely nothing to do with the Churches here. In fact, Plaintiffs claim they communicated with "various" school officials, "rent[ed] out a number of facilities," "sent 154 detailed requests" to school officials,

[1] Ironically, the only time Plaintiffs ever utter the proper pre-amendment original source standard ("direct and independent") is when they seek to saddle the Churches with disproving jurisdiction.

[2] Plaintiffs also assert that the Churches failed to follow the ICA's "[d]irectives." Opp. 6. But the Churches have done what is required by presenting documentary evidence for the public disclosures and explaining how those disclosures trigger the bar. *See* Defs' Memo. 9-10, 13-16. Plaintiffs' suggestion that the Churches should have assigned public disclosures *ad seriatim* to each of the over 600-plus alleged false claims finds no support in the case law or in common sense, and would be unnecessarily duplicative here because one public disclosure often bars numerous claims at once.

and "audited over 40 churches." Opp. 11-12. But the Churches represent only two of the 40 churches audited and two of the schools visited (Kaimuki and Mililani High School), and Plaintiffs admit that they never rented any facilities connected to the Churches. Kahle Dep. 62:23–63:13; Huber Dep. 81:15–82:08. Plaintiffs must respond to this Motion with evidence relevant only to these two Churches and the two schools the Churches rented. Plaintiffs failed to do so. Moreover, the small portion of Plaintiffs' efforts that did pertain to the Churches either triggered fatal public disclosures or merely confirmed what the public disclosures had already revealed.

ARGUMENT

I. The FAC is based upon public disclosures, triggering the HFCA's public disclosure bar for both Plaintiffs' pre-amendment and post-amendment claims.

For Plaintiffs' pre-amendment claims, this Court must determine (1) whether Plaintiffs' "allegations or transactions" were publicly disclosed through one or more of the sources specified in the statute, which include "administrative report[s] [and] investigation[s]" and "news media," and (2) whether Plaintiffs' action is "based upon" those publicly disclosed allegations or transactions. HRS § 661-28 (2011); *accord Malhotra v. Steinberg*, 770 F.3d 853, 858 (9th Cir. 2014). Plaintiffs' post-amendment claims involve a similar inquiry, requiring this Court to determine whether Plaintiffs' "allegations or transactions" are "substantially the same as those publicly disclosed." HRS § 661-31(b). "Based upon" has been interpreted to mean "substantially similar to" or "supported by." *U.S. ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 573 (9th Cir. 2016); *U.S. ex rel. Boothe v. Sun Healthcare Grp., Inc.*, 496 F.3d 1169, 1173 (10th Cir. 2007). "Substantially similar to" does not require that an FCA complaint be "identical with" or "derived from" public disclosures, *Mateski*, 816 F.3d at 573, and "supported by" includes actions "even partly based upon" public disclosures, *U.S. ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992). Put another way, if either an allegation of fraud *or* its essential elements are publicly disclosed, the bar applies. *Mateski*, 816 F.3d at 571. Given these parameters, Plaintiffs' FAC is based upon public disclosures, thereby triggering the bar.

A. Responses to UIPA requests, information gleaned from the Churches' websites, and responses to Plaintiffs' public records requests to school officials all constitute public disclosures.

It is undeniable that the responses received by Plaintiffs to their UIPA requests constitute public disclosures, because they qualify as "reports" subject to the jurisdictional bar. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 410–11 (2011). Plaintiffs concede as much, as they must. Opp. 8, 9, 14. But contrary to Plaintiffs' protestations, the results of Plaintiffs' inquiries to school officials and the information they obtained from the Churches' websites also qualify as public disclosures.

Plaintiffs argue that their "direct communications with the schools" "translated into additional compelling facts" separate and apart from public disclosures. Opp. 10. Not so. Plaintiffs submitted these inquiries under UIPA. *E.g.*, Ex. F at 1 ("Dear Principal Brummel: This inquiry regarding [Calvary Chapel Central Oahu] is covered under the Uniform Information Practices Act."). Responses to them are public disclosures under the HFCA. *See Schindler*, 563 U.S. at 401; *U.S. ex rel. Mistick PBT v. Hous. Auth. of City of Pittsburgh*, 186 F.3d 376, 382–85 (3d Cir. 1999) (response to FOIA request constituted public disclosure as an "administrative report" and an "administrative . . . investigation").

Plaintiffs also argue the Churches' website information is not "news media" under the HFCA because no case has explicitly defined *churches'* websites as such, and they are not drawn from government or scholarly sources. Opp. 15. These objections fail. Hawaii has no reported case law on the HFCA, so the ostensible gap is unremarkable. So too is the purported gap in other jurisdictions; until Plaintiffs started their crusade, no one in the long history of the FCA scoured their local church websites, surveilled them based on that information, and then turned their quarrel with the state department of education into a fraud case. Finally, meritless too is Plaintiffs' attempt to circumscribe "news media" to government or scholarly sources—there is no such arbitrary boundary imposed by statute or even Plaintiffs' handpicked cases. The Supreme Court has instead noted that scope of this term has a "broad[] sweep," *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010), and "[c]ourts have unanimously construed the term 'public disclosure' to include websites and online articles," *U.S. ex rel. Beauchamp v. Academi Training Ctr.*, 816 F.3d 37, 43 n.6 (4th Cir. 2016), that are "readily accessible," *U.S. ex rel. Green v. Serv. Contract Educ. & Training Tr. Fund*, 843 F. Supp. 2d 20, 32 (D.D.C. 2012). Additionally, courts consistently treat the publicly available websites of FCA defendants as news media, because they "disseminate information about the [defendant's] programs." *U.S. ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 813 (11th Cir. 2015). The Churches' websites therefore qualify as news media—they are publicly accessible and disseminate information about the Churches' own services. Otherwise, Plaintiffs would not have turned to them in the first place or relied heavily on them. *E.g.*, Kahle Dep. 101:01–102:04; Huber Dep. 94:04–95:06

B. Plaintiffs' FAC is based upon public disclosures, and nothing about Plaintiffs' "investigation" changes that conclusion.

Plaintiffs try to evade the public disclosure bar by arguing that their self-styled investigation provided the "facts and circumstances showing . . . falsity." Opp. 9. But Plaintiffs' project almost exclusively involved them requesting, receiving, and researching public disclosures, including the BO-1s, contracts, and emails produced in response to Plaintiffs' UIPA requests, along with the Churches'

website information. Each of these documents/sources is a public disclosure, and together they provided Plaintiffs with both the "claimed use" and "actual use" by the Churches of school facilities. Opp. 13. Once the universe of "public disclosures" is properly delineated, it becomes clear they formed not only the gravamen of Plaintiffs' FAC but provided even its discrete allegations, right down to every jot and tittle. *See* Defs' Memo. 9-10, 13-16 (detailing which public disclosures contain the information underlying Plaintiffs' allegations).[3]

Plaintiffs' much touted in-person visits do not alter this conclusion, Opp. 11-12, because those admittedly limited and haphazard affairs merely confirmed what the public disclosures had revealed, or uncovered minutiae that is irrelevant to the analysis. Defs' Memo. 14-15. Plaintiffs' "custom relational database" is similarly unavailing—cataloging publicly disclosed information does not make it any less public. So too is Plaintiffs' assertion that the Churches cannot explain how Plaintiffs could have known about a laundry list of supposed information from the public disclosures. Opp. 14.

Indeed, Plaintiffs assert that the Churches' actual use of school facilities for Sunday services was unclear from their BO-1 applications, meaning that Plaintiffs must be original sources of that information. Opp. 14. But as explained, the Churches' use of school facilities was publicly available on the Churches' websites, and the schools themselves responded to Plaintiffs' UIPA requests by providing Plaintiffs with an explanation of the Churches' use. *See* Defs' Memo. 15–16. Plaintiffs also contend they are original sources for their allegations that the Churches used excessive utilities, plugged their equipment directly into the schools' electrical outlets, did not install independent meters, sometimes had over-capacity crowds, used storage areas, and possessed building keys. Opp. 14. But none of these allegations amount to a false claim. Regardless of whether Plaintiffs think they evidence violations of the Community Use Program, "violations of laws, rules, or regulations alone do not create False Claims Act liability." *Lum v. Vision Serv. Plan*, 104 F. Supp. 2d 1237, 1241 (D. Haw. 2000). What is more, Plaintiffs admitted to knowing nothing about whether the Churches stored anything inside the schools, Kahle Dep. 113:21–23, or whether the Churches' consumption of utilities was truly excessive, Kahle Dep. 109:10–19; Huber Dep. 200:21–23.

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[3] Plaintiffs' attempts to turn *Mateski* and *Schindler* to their advantage fail. Opp. 7-9, 11. *Mateski* found that the relator's "allegations [were] vastly more precise than the prior public reports" and that while those prior reports "described general problems . . . *none* provided specific examples or the level of detail offered by *Mateski*." 816 F.3d at 578 (emphasis added). The opposite is true here, where the public disclosures provided all the essential elements of the supposed false claims, down to minute details. *Schindler* too provides no succor. There, just as here, because the relator had all he needed from the public disclosures to compose and file his suit, the public disclosure bar was triggered.

C. Plaintiffs' last-ditch attempt to avoid the original source inquiry by improperly raising the standard for triggering the public disclosure bar should be rejected.

Plaintiffs try to cure their near total reliance on public disclosures by fashioning a new standard from whole cloth, declaring that "to be dismissed, a *qui tam* complaint must be based, not simply 'in part,' on publicly disclosed, barred information, but rather, **primarily** or **in large part** or **in its majority** on publicly disclosed, barred information." Opp. 9 (emphasis in original). This position is flatly rejected by FCA jurisprudence.

Indeed, according to a preeminent FCA practitioner and scholar, "if the information in the complaint is based 'in any part' on the allegations or transactions in the public domain, the relator's action is barred, even if the relator asserted some facts that were not in the public domain, unless the relator qualifies as an original source." Robert S. Salcido*, False Claims Act & the Healthcare Industry* at 353 (2d Ed. 2008). Hosts of courts concur. *See, e.g.*, *Precision Co.*, 971 F.2d at 552 (FCA action "even partly based upon" public disclosures "is nonetheless 'based upon'" such disclosures); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 975 (6th Cir. 2005) ("individuals who base any part of their allegations on publicly disclosed information" subject to bar).

Plaintiffs' handpicked authority, *U.S. ex rel. Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys.*, came to the very same conclusion, affirming the dismissal of an FCA complaint and reiterating the axiomatic principle that "[a]n FCA qui tam action even partly based upon public allegations or transactions is nonetheless" subject to the public disclosure bar. 384 F.3d 168, 176 (5th Cir. 2004). The *Reagan* court merely stated that because the relator's action was based in "significant part" on public disclosures, it was certainly "partly based" on those disclosures and therefore barred unless the relator could establish original source status. *Id.* It did not create a heightened standard for triggering the public disclosure bar, as Plaintiffs contend. Plaintiffs' other proffered cases prove equally wanting. *See Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 (11th Cir. 1994) (public disclosure bar applies when relator's suit "at least partially based upon this revelation"); *U.S. ex rel. Colquitt v. Abbott Labs.*, 864 F. Supp. 2d 499, 526 (N.D. Tex. 2012) (based upon includes "partly based on").

II. Plaintiffs are not "original sources" under the pre-amended HFCA.

To be original sources under the pre-amended public disclosure bar, Plaintiffs must have both "direct and independent knowledge of the information on which the allegations are based" and their "information must provide[] the basis or catalyst" for what "led to the public disclosure." HRS § 661-28 (2011). Direct knowledge must be "firsthand" or "unmediated by anything else," *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1104 (9th Cir. 2017), while independent knowledge requires "relevant evidence of

fraud prior to the public disclosure of the allegations." *Amphastar Pharm. Inc. v. Aventis Pharma SA*, 856 F.3d 696, 705 (9th Cir. 2017). As noted above, Plaintiffs have not even tried to show that they have direct and independent knowledge, effectively conceding they do not. But even had they tried, no explanation would have sufficed on this record.

A. By definition and common-sense Plaintiffs cannot have "direct and independent knowledge" of anything before their investigation began in 2012.

In their Motion the Churches made the self-evident point that because Plaintiffs did not begin their investigation until 2012, they cannot have "firsthand knowledge" of any alleged fraud before then. Defs' Memo. 10-12. Remarkably, Plaintiffs have left the argument entirely unanswered. But logic and Plaintiffs' admissions tell the story they refuse to acknowledge.

First, Plaintiffs lack "firsthand knowledge" of events occurring before their investigation, because they admit to having *no knowledge* of anything occurring during that time. Kahle Dep. 97:03–07; Huber Dep. 101:06–16. Second, Plaintiffs' knowledge about the Churches' use of the schools could not be independent for the pre-investigation timeframe because it was gained only after, not before, public disclosures. Kahle Dep. 20:6-11 (admitting that the BO-1 UIPA requests were necessary because Plaintiffs "did not know before" sending them out what the arrangements were between the schools and the Churches). These admissions are fatal. For the pre-investigation timeframe, Plaintiffs are left with secondhand knowledge based on information gleaned from public disclosures, along with suspicion, conjecture, guesswork, and backward extrapolation—none of which suffices to make them original sources. *See Malhotra*, 770 F.3d at 860 ("generalized suspicion" not independent "knowledge").

B. Plaintiffs do not have "direct and independent knowledge" about the Churches' pre-amendment Sunday services.

Plaintiffs assert 675 claims in their FAC—fully 626 of them relate to Sunday services (313 per church), and 554 of those 626 relate to Sunday services that took place before the HFCA was amended on July 9, 2012. Defs' Memo. 12 n. 6. Plaintiffs must therefore show "direct and independent knowledge" to support each of those 554 allegations. They instead argue that they "materially added to the publicly disclosed information." Opp. 11. This is not only false, but Plaintiffs again invoke the wrong standard. Their failure to even try to meet the "direct and independent knowledge" standard means they have not carried their jurisdictional burden, requiring dismissal of these claims.

These pre-amended claims also merit dismissal for much of the same reasons above. They are of necessity based on public disclosures because Plaintiffs knew nothing about the Churches' activities before receiving responses to UIPA requests—indeed, Plaintiffs conceded that they "didn't know anything" and were "[s]tarting from scratch." Kahle Dep. 42:02. Moreover, any additional information

Plaintiffs learned about any of these services came from other public disclosures, including the Churches' websites. *See* Defs' Memo. 12–16. Despite their repeated resort to citing their in-person visits as an integral part of their investigation, Plaintiffs could not have gained any "direct" or "independent" knowledge of the Churches' Sunday services until 2012, *at the earliest*. And a side-by-side comparison between Plaintiff's FAC and the public disclosures on record reveal that these visits at most confirmed what the disclosures had made plain. *See* Defs' Memo. 15-16.

C. Plaintiffs do not have "direct and independent knowledge" about the Churches' special events.

Plaintiffs make much of the fact that they "itemized" claims "for special events" held by the Churches, assert that "no public material exposed these," and argue that the Churches "failed to meaningfully address these allegations." Opp. 17-18. Again, not true. Although it is Plaintiffs' burden to *prove* such status and not the Churches' to *disprove* it, the Churches addressed Plaintiffs' necessarily secondhand knowledge and debunked any notion they can be original sources for these claims. *See* Defs' Memo. 17. Indeed, Plaintiffs testified that they never attended, observed, or even spoke to anyone about these events, so there is no way they can have "direct and independent knowledge" about any of them. Kahle Dep. 99:12–100:05, 106:16–108:07; Huber Dep. 129:15–130:08, 154:20–155:19. Plaintiffs' "efforts" amounted to mining public disclosures (BO-1 Applications, or the lack thereof, and the Churches' websites), comparing those disclosures, and then alleging fraud wherever they spied an apparent discrepancy, despite having no actual proof of a false claim. *See* Defs' Memo. 17; Exs. T & U. This is not "direct and independent knowledge" but rather rank speculation.

III. Plaintiffs are not original sources under the post-amended HFCA.

Plaintiffs invoke the law-of-the-case doctrine, claiming that this Court's earlier orders "held that they were original sources" as to their post-amendment claims. Opp. 4. Not so. This Court held only that Plaintiffs stated a claim to survive a *Rule 12(b)(6)* motion. *See* ICA Op. 17 n. 8. The Churches do not seek to revisit that ruling, so the law of the case is not implicated. The Churches move for summary judgment on the post-amendment claims.[4]

To qualify as an original source under the post-amendment HFCA, Plaintiffs must show that they have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." HRS § 661-31(c)(2). "Independent" refers to knowledge acquired "prior to" public

[4] Plaintiffs are mistaken in suggesting that the Churches were unclear that they are proceeding under Rule 56 for challenging the post-amendment claims. Opp. 20. The Churches clearly stated that they "seek summary judgment on their public disclosure affirmative defense for claims arising on or after" the date of the HFCA amendment. Defs' Memo. 8.

disclosures, *Amphastar Pharm.*, 856 F.3d at 705, and "materially adds" requires more than the addition of "detail or color to previously disclosed elements of an alleged scheme." *U.S. ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211–13 (1st Cir. 2016). Plaintiffs argue that they discovered independent information that materially added to public disclosures by (1) visiting schools, (2) communicating with school officials, and (3) "renting out a number of facilities to assess varying rates being applied and charged." Opp. 11-12. Plaintiffs argument fails.

Take each point in turn. *First*, as detailed in the Churches' Motion and Memorandum, Plaintiffs' in-person visits to Kaimuki and Mililani HS were few in number, short in duration, and merely confirmed information already in public disclosures. *See* Defs' Memo. 11-17. At most they added color to that information, which is insufficient to establish independence or materiality. *Winkelman*, 827 F.3d at 211–13. *Second*, Plaintiffs do not identify a single communication with Kaimuki or Mililani school officials that they claim make them original sources. Nor could they. Learning about something from someone else is not direct, firsthand knowledge. And in any event, Plaintiffs testified that they never spoke to any Kaimuki or Mililani HS officials. *See* Huber Dep. 73:15–17; 74:16–18 87:06–17, 90:18–21, 130:05–08, 155:17–19. Plaintiffs must support their claims with evidence related to the Churches and the two schools involved. The only communications they did have with the relevant schools were UIPA requests, which fall under the public disclosure bar. *See, e.g.*, Ex. F at 1 ("Dear Principal Brummel: This inquiry regarding [Calvary Chapel Central Oahu] is covered under the Uniform Information Practices Act . . . ."). *Third*, Plaintiffs admitted that they did not rent any school facilities hosting the Churches, so that too does not make them original sources. Kahle Dep. 62:23–63:13; Huber Dep. 81:15–82:08. *Finally*, all of Plaintiffs' knowledge was derivative of public disclosures and thus gained afterwards, defeating any claim that their knowledge was independent.

IV. Plaintiffs' attempt to delay or avoid altogether this Court's consideration of the Churches' Motion should be denied.

Plaintiffs argue that the jurisdictional question "is inherently intertwined with [their] substantive claims for relief." Opp. 2. Plaintiffs' counsel further argues that there are disputed facts and that Plaintiffs "have not yet been provided the chance to take any discovery whatsoever." Tannenbaum Dec. ¶¶11-12. These assertions are untrue. In fact, Plaintiffs' ploy is a common one often advanced at the 11th hour by relators facing the prospect of dismissal on public disclosure bar grounds, and these attempts are routinely rejected. *See, e.g.*, *Vuyyuru*, 555 F.3d at 349.

"Under the FCA . . . [t]he elements underlying substantive causes of action and the jurisdictional bars do not overlap and are not otherwise intertwined." *Salcido*, False Claims Act 414-

15; *accord U.S. ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506, 515 (3d Cir. 2007) ("Atkinson's underlying burden to prove a substantive violation of the FCA is in no way intertwined with his burden to establish jurisdiction."). "[L]ogic dictates" that the "proof required to establish" a false claim "is wholly distinct from that necessary to survive [a defendant's] jurisdictional challenge under [the public disclosure bar]." *Vuyyuru*, 555 F.3d at 349–50.

This case is no different. The jurisdictional inquiry looks at whether public disclosures occurred and, if they did, whether Plaintiffs qualify as original sources. The substantive inquiry instead looks at whether false claims were submitted given the very different parameters governing that question. Plaintiffs cannot insulate themselves from this Court's consideration of the Churches' Motion by positing an "intertwining" where none exists.[5] Moreover, Plaintiffs' incredible claim that they have not had a chance to conduct discovery ignores these facts: (1) the stipulation filed September 12, 2018 upon remand from the ICA, in which the "parties" agreed to engage in "discovery related to whether the public disclosure bar of the pre- and post-amended HFCA applies to Relators' claims"; and (2) Plaintiffs' August 29, 2019 report to this Court, stating that the "parties" had completed "substantial discovery" and arguing for an expedited briefing so this matter could be resolved expeditiously. *See* Exhibit A (attached hereto). The truth is Plaintiffs chose not to propound any written discovery or to take any depositions during a more than eleven-month discovery period.

CONCLUSION

Plaintiffs entire project began with a search for public information, precisely because they admittedly knew nothing about the relationship between Hawaii's schools and the Churches. So when they decided to turn their planned DOE report into a fraud complaint against the Churches, their complaint naturally bore all the hallmarks of public disclosures. That unalloyed reliance is fatal to Plaintiffs' action. Accordingly, for the reasons outlined here and in the Churches' opening memorandum, this Court should dismiss Plaintiffs' pre-amendment claims for lack of jurisdiction, grant the Churches' Rule 56 Motion for Summary judgment as to their public disclosure bar affirmative defense to Plaintiffs' post-amendment claims, and dismiss the case in its entirety with prejudice.

Dated: Honolulu, Hawaii April 27, 2020.

/s/ James Hochberg
Attorney for Defendants Churches

[5] Plaintiffs' cases do not support their argument. Opp. 1-2. *Morrison v. Amway Corp.*, 323 F.3d 920, 927 (11th Cir. 2003), is an FMLA case where the "threshold jurisdictional question" was also a "prima facie element for recovery." And *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1093 (11th Cir. 2018), involved a statute of limitations challenge to an FCA action.